

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ADOLPHUS BENNETT and PANAMA CANAL COMMISSION,  
LOCKS DIVISION, Miami, Fla.

*Docket No. 96-2009; Submitted on the Record;  
Issued July 8, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of \$4,394.36 was created during the period September 1, 1990 to September 16, 1995; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly required repayment by deducting \$50.00 every four weeks from appellant's continuing compensation.

In the present case the Office accepted that appellant sustained a left arm fracture in the performance of duty on May 6, 1983. Appellant began receiving compensation for temporary total disability, and during the period March 1, 1988 to December 18, 1989 appellant was paid pursuant to a schedule award for a 31 percent permanent impairment to the left arm. Following the expiration of his schedule award, appellant initially received disability retirement benefits from the Office of Personnel Management through August 31, 1990, and commencing September 1, 1990 appellant began receiving compensation benefits. The record indicates that deductions for health insurance were not made from appellant's continuing compensation payments.

By letter dated October 25, 1995, the Office advised appellant that it had made a preliminary determination that an overpayment of \$4,394.36 had occurred during the period September 1, 1990 to September 16, 1995, because health insurance deductions had not been made. The Office found that appellant was without fault in creating the overpayment.

In a decision dated December 11, 1995, the Office finalized the finding of a \$4,394.96 overpayment. The Office denied waiver of the overpayment, stating that appellant had not submitted evidence regarding his financial circumstances. With regard to repayment, the Office indicated that \$50.00 would be withheld from continuing compensation payments.

On December 15, 1995, the employing establishment submitted additional information, including an overpayment recovery questionnaire (Form OWCP-20) dated November 29, 1995.<sup>1</sup>

In a decision dated January 2, 1996, the Office found that appellant had \$188.17 in monthly income in excess of expenses, and, therefore, “our decision dated October 25, 1995 stands.”<sup>2</sup> The Board has reviewed the record and finds that an overpayment of \$4,394.36 was created during the period September 1, 1990 to September 16, 1995.

The record indicates that appellant began receiving compensation as of September 1, 1990 without any deduction for health insurance benefits. Appellant does not dispute that health insurance deductions were not made. For the period September 1, 1990 to September 16, 1995, the Office calculated that the amount of the deductions should have been \$4,394.36.<sup>3</sup> The Board therefore finds that an overpayment of \$4,394.36 was created.

The Board further finds that the case is not in posture for decision on the issue of waiver of the overpayment.

Section 8129(b) of the Federal Employees’ Compensation Act<sup>4</sup> provides: “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience.”<sup>5</sup> Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth, respectively, in sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.

Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual’s assets, those which are not exempt from recovery, do not exceed a resource base of

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<sup>1</sup> It appears that appellant had submitted evidence to the employing establishment and there was a delay in submitting the evidence to the Office.

<sup>2</sup> The previous decision was actually dated December 11, 1995. Although the January 2, 1996 letter does not appear to be accompanied by appeal rights, it clearly represents an adverse final decision on the overpayment issues.

<sup>3</sup> The December 11, 1995 decision reports the overpayment amount as \$4,394.96. The January 2, 1996 decision, however, correctly indicated that the overpayment amount is \$4,394.36.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 5 U.S.C. § 8129(b).

\$3,000 (or \$5,000 if the individual has a spouse or one dependent).<sup>6</sup> Section 10.323 provides that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by using the same criteria set forth in 20 C.F.R. § 10.322; or the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.

In this case the Office initially denied waiver of the overpayment on the grounds that appellant did not submit financial information. It is appellant’s responsibility to submit financial information, and failure to timely submit the required information shall result in denial of waiver.<sup>7</sup> If the requested information is subsequently furnished, however, the Office can consider a request for waiver.<sup>8</sup> In this case it appears that appellant submitted a request for waiver and additional evidence to the employing establishment prior to the December 11, 1995 Office decision; in any case, once the Office received the evidence, it should have made a finding on the waiver issue. The January 2, 1996 Office decision does not specifically discuss waiver of the overpayment, other than to reaffirm the prior decision. To the extent that the Office denied waiver of the overpayment on the grounds that appellant had excess monthly income over his expenses, and therefore he would not be deprived of resources needed for ordinary and necessary living expenses,<sup>9</sup> the Board finds the case requires further development.

Appellant submitted a Form OWCP-20 dated November 29, 1995, in which he indicated that his monthly expenses were \$711.75. With regard to income, appellant indicated on the form that he had \$492.00 in compensation benefits, plus \$188.00 of additional household earnings from his son’s employment. The Office determined, however, that appellant’s compensation benefits were \$657.16 every four weeks, which is equivalent to \$711.92 every month.

With regard to the additional earnings from his son, appellant raises the issue on appeal of whether this income should have been included. Regulations at 20 C.F.R. § 10.322(b) provide that total income includes “any funds which may be reasonably considered available for his or her use, regardless of source.” The Office failed to develop the record or make any factual findings as to whether the son’s income “may be reasonably considered available” to appellant. Neither appellant nor his son were asked to provide information regarding the availability to appellant of the son’s earnings. The “excess” monthly income in this case appears to be derived solely from the additional earnings reported for appellant’s son, and therefore it is critical to determine

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<sup>6</sup> To establish that recovery would defeat the purpose of the Act, appellant must show both that he needs substantially all his income to meet ordinary and necessary living expenses, and that his assets do not exceed the established resource base; see *Robert E. Wenholz*, 38 ECAB 311 (1986).

<sup>7</sup> 20 C.F.R. § 10.324.

<sup>8</sup> See *Gail M. Roe*, 47 ECAB \_\_\_\_ (Docket No. 94-764, issued December 12, 1995); 20 C.F.R. § 10.324 states that failure to furnish financial information within 30 days of the request shall result in denial of waiver, and no further requests for waiver shall be entertained “until such time as the requested information is furnished.”

<sup>9</sup> The Board notes that there is no indication that appellant’s nonexempt assets exceeded the resource base established under 20 C.F.R. § 10.322(a)(2); he reported only \$40.00 in cash and listed no other assets.

whether the son's income was properly included.<sup>10</sup> The Board is unable to determine if the son's earnings, or a portion thereof, were reasonably available to appellant, since no evidence was obtained and no findings were made by the Office.

Accordingly, the Board finds that the case must be remanded to the Office for further development on the issue of waiver of the overpayment. Since the issue of waiver is not in posture for decision, the Board will not address the issue of the rate of repayment from continuing compensation.

The decisions of the Office of Workers' Compensation Programs dated January 2, 1996 and December 11, 1995 are set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
July 8, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Bradley T. Knott  
Alternate Member

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<sup>10</sup> A similar situation was presented in *Thomas Lee Jones*, 48 ECAB \_\_\_\_ (Docket No. 95-1107, issued September 9, 1997), where an Office hearing representative included the son's earnings in determining monthly income. The Board found the Office abused its discretion by failing to develop the evidence on whether the son's income could be reasonably be considered available to appellant.